UNITED STATES FOREIGN
INTELLIGENCE SURVEILLANCE COURT
Washington, D.C.

Honorable Reggie B. Walton
Presiding Judge

October 11, 2013

Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

On July 29, 2013, the Foreign Intelligence Surveillance Court (FISC) corresponded with the Senate Judiciary Committee in a response to questions about the Court's practices (copy enclosed). In our response, we explained in greater detail the process by which the Court interacts with the executive branch. Among other things, we noted:

> The annual statistics provided to Congress by the Attorney General pursuant to 50 U.S.C. §§ 1807 and 1862(b) – frequently cited to in press reports as a suggestion that the Court's approval rate of applications is over 99% – reflect only the number of *final* applications submitted to and acted on by the Court. These statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that a judge would not approve them.

Our letter also stated, "In a typical week, the Court seeks additional information or modifies the terms proposed by the government in a significant percentage of cases." We further indicated that the FISC was then just beginning a practice of collecting statistics on the rate at which such modifications occur. We are now ready to provide some initial statistics in this regard.

During the three month period from July 1, 2013 through September 30, 2013, we have observed that 24.4% of matters submitted ultimately involved substantive changes to the information provided by the government or to the authorities granted as a result of Court inquiry or action. This does not include, for example, mere typographical corrections. Although we have every reason to believe that this three month period is typical in terms of the historic rate of modifications, we will continue to collect these statistics for an additional period of time and we will inform you if those data suggest that the recent three months were anomalous. It should be noted, however, that these statistics are an attempt to measure the results of what are, typically, informal communications between the branches. Therefore, the determination of exactly when a

modification is "substantial," and whether it was caused solely by the FISC's intervention, can be a judgment call.

We hope this information is helpful to Congress and the public in better understanding the role and operations of the FISC.

Sincerely,

Reggie B. Walton
Presiding Judge

Enclosure

Identical letters sent to:

Honorable Patrick J. Leahy
Honorable Bob Goodlatte
Honorable John Conyers, Jr.
Honorable Dianne Feinstein
Honorable Saxby Chambliss
Honorable Mike Rogers
Honorable C. A. Dutch Ruppersberger

UNITED STATES FOREIGN
INTELLIGENCE SURVEILLANCE COURT
Washington, D.C.

Honorable Reggie B. Walton
Presiding Judge

July 29, 2013

Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Grassley:

I am writing in response to your letter of July 18, 2013, in which you posed several questions about the operations of the Foreign Intelligence Surveillance Court (the Court). As you requested, we are providing unclassified responses. We would note that, as a general matter, the Court's practices have evolved over time. Various developments in the last several years – including statutory changes, changes in the size of the Court and its staff, the adoption of new Rules of Procedure in 2010, and the relocation of the Court's facilities from the Department of Justice headquarters to a secure space in the federal courthouse in 2009 – have affected some of these practices. The responses below reflect the current practices of the Court.

1. *Describe the typical process that the Court follows when it considers the following: (1) an application for an order for electronic surveillance under Title I of FISA; (2) an application for an order for access to business records under Title V of FISA; and (3) submissions from the government under Section 702 of FISA. As to applications for orders for access to business records under Title V of FISA, please describe whether the process for the Court's consideration of such applications is different when considering requests for bulk collection of phone call metadata records, as recently declassified by the Director of National Intelligence.*

Each week, one of the eleven district court judges who comprise the Court is on duty in Washington. As discussed below, most of the Court's work is handled by the duty judge with the assistance of attorneys and clerk's office personnel who staff the Court. Some of the Court's more complex or time-consuming matters are handled by judges outside of the duty-week system, at the discretion of the Presiding Judge. In either case, matters before the Court are thoroughly reviewed and analyzed by the Court.

Rule 9(a) of the United States Foreign Intelligence Surveillance Court Rules of Procedure

(FISC Rules of Procedure)[1] requires that except in certain circumstances (i.e., a submission pursuant to an emergency authorization under the statute or as otherwise permitted by the Court), a proposed application must be submitted by the government no later than seven days before the government seeks to have the matter entertained.[2] Upon the Court's receipt of a proposed application for an order under FISA, a member of the Court's legal staff reviews the application and evaluates whether it meets the legal requirements under the statute. As part of this evaluation, a Court attorney will often have one or more telephone conversations with the government[3] to seek additional information and/or raise concerns about the application. A Court attorney then prepares a written analysis of the application for the duty judge, which includes an identification of any weaknesses, flaws, or other concerns. For example, the attorney may recommend that the judge consider requiring the addition of information to the application; imposing special reporting requirements;[4] or shortening the requested duration of an authorization.

The judge then reviews the proposed application, as well as the attorney's written analysis.[5] The judge typically makes a preliminary determination at that time about what course

---

[1] A copy of the FISC Rules of Procedure is appended hereto as Attachment A. The rules are also available at http://www.uscourts.gov/uscourts/rules/FISC2010.pdf.

[2] A proposed application is also sometimes referred to as a "read copy" and has been referred to in this manner in at least one recent congressional hearing. A proposed application or "read copy" is a near-final version of the government's application, which does not include the signatures of executive branch officials required by statutory provisions such as 50 U.S.C. §§ 1804(a)(6) and 1823(a)(6). As described below, in most circumstances, the government will subsequently file a final copy of an application pursuant to Rule 9(b) of the FISC Rules of Procedure. Both the proposed and final applications include proposed orders.

The process of using proposed applications and final applications is altogether similar to the process employed by other federal courts in considering applications for wiretap orders under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended ("Title III"), which is codified at 18 U.S.C. §§ 2510-2522.

[3] In discussing Court interactions with "the government" throughout this document, I am referring to interactions with attorneys in the Office of Intelligence of the National Security Division of the United States Department of Justice.

[4] Pursuant to 50 U.S.C. §§ 1805(d)(3) and 1824(d)(3), the Court is authorized to assess compliance with the statutorily-required minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

[5] For each application, the Court retains the attorney's written analysis and the notes made by the judge, so that if the government later seeks to renew the authorization, the judge who considers the next

of action to take. These courses of action might include indicating to Court staff that he or she is prepared to approve the application without a hearing; indicating an inclination to impose conditions on the approval of the application; determining that additional information is needed about the application; or determining that a hearing would be appropriate before deciding whether to grant the application. A staff attorney will then relay the judge's inclination to the government, and the government will typically proceed by providing additional information, or by submitting a final application (sometimes with amendments, at the government's election) for the Court's ruling pursuant to Rule 9(b) of the FISC Rules of Procedure. In conjunction with its submission of a final application, the government has an opportunity to request a hearing, even if the judge did not otherwise intend to require one. The government might request a hearing, for example, to challenge conditions that the judge has indicated he or she would impose on the approval of an application. If the judge schedules a hearing, the judge decides whether to approve the application thereafter. Otherwise, the judge makes a determination based on the final written application submitted by the government. In approving an application, a judge will sometimes issue a Supplemental Order in addition to signing the government's proposed orders. Often, a Supplemental Order imposes some form of reporting requirement on the government.

If after receiving a final application, the judge is inclined to deny it, the Court will prepare a statement of reason(s) pursuant to 50 U.S.C. § 1803(a)(1). In some cases, the government may decide not to submit a final application, or to withdraw one that has been submitted, after learning that the judge does not intend to approve it. The annual statistics provided to Congress by the Attorney General pursuant to 50 U.S.C. §§ 1807 and 1862(b) – frequently cited to in press reports as a suggestion that the Court's approval rate of applications is over 99% – reflect only the number of *final* applications submitted to and acted on by the Court. These statistics do not reflect the fact that many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that a judge would not approve them.[6]

Most applications under Title V of FISA are handled pursuant to the process described above. However, applications under Title V of FISA for bulk collection of phone call metadata records are normally handled by the weekly duty judge using a process that is similar to the one described above, albeit more exacting. The government typically submits a proposed application of this type more than one week in advance. The attorney who reviews the application spends a

---

application has the benefit of the prior thoughts of the judge(s) and staff, and a written record of any problems with the case.

[6] Notably, the approval rate for Title III wiretap applications (see note 2 above) is higher than the approval rate for FISA applications, even using the Attorney General's FISA statistics as the baseline for comparison, as recent statistics show that from 2008 through 2012, only five of 13,593 Title III wiretap applications were requested but not authorized. See Administrative Office of the United States Courts, *Wiretap Report 2012*, Table 7 (available at http://www.uscourts.gov/uscourts/statistics/wiretapreports/2012/Table7.pdf).

greater amount of time reviewing and preparing a written analysis of such an application, in part because the Court has always required detailed information about the government's implementation of this authority. The judge likewise typically spends a greater amount of time than he or she normally spends on an individual application, carefully considering the extensive information provided by the government and determining whether to seek more information or hold a hearing before ruling on the application.

As described above, the majority of applications submitted to the Court are handled on a seven-day cycle, by a judge sitting on a weekly duty schedule. Applications that are novel or more complex are sometimes handled on a longer time-line, usually require additional briefing, and are assigned by the Presiding Judge based on judges' availability. Section 702 (i.e., 50 U.S.C. § 1881a) applications[7] would typically fall into this category.

Where the Court's process for handling Section 702 applications differs from the process described above, it is largely based on the statutory requirements of that section, which was enacted as part of the FISA Amendments Act of 2008 (FAA). Pursuant to 50 U.S.C. §§ 1881a(g)(1)(A) & (g)(2)(D)(i), prior to the implementation of an authorization under Section 702, the Attorney General and the Director of National Intelligence must provide the Court with a written certification containing certain statutorily required elements, and that certification must include an effective date for the authorization that is at least 30 days after the submission of the written certification to the Court.[8] Under 50 U.S.C. § 1881a(i)(B), the Court must review the certification, as well as the targeting and minimization procedures adopted in accordance with 50 U.S.C. §§ 1881a(d) & (e), not later than 30 days after the date on which the certification and procedures are submitted. The statutorily-imposed deadline for the Court's review typically coincides with the effective date identified in the final certification filed with the Court.

The government's submission of a Section 702 application typically includes a cover filing that highlights any special issues and identifies any changes that have been made relative to the prior application. The government has typically filed proposed (read copy) Section 702 applications approximately one month before filing a final application. Proposed Section 702 applications are reviewed by multiple members of the Court's legal staff. At the direction of the Presiding Judge or a judge who has been assigned to handle the Section 702 application, the

---

[7] "Section 702 application" is used here to refer collectively to a Section 702 certification and supporting affidavit, as well as to the statutorily-required targeting and minimization procedures.

[8] If the acquisition has already begun (e.g., pursuant to a determination of exigent circumstances under 50 U.S.C. § 1881a(c)(2)) or the effective date is less than 30 days after the submission of the written certification to the Court (e.g., because of an amendment to a certification while judicial review is pending, pursuant to 50 U.S.C. § 1881a(i)(1)(C)), 50 U.S.C. § 1881a(g)(2)(D)(ii) requires the certification to include the date the acquisition began or the effective date of the authorization.

Court's legal staff may request a meeting with the government to discuss a proposed application. Also at the direction of the Presiding Judge or a judge who has been assigned to handle the Section 702 application, the Court legal staff may request additional information from the government or convey a judge's concerns about the legal sufficiency of a proposed Section 702 application. Following these interactions, the government files a final Section 702 application, which the government may have elected to amend based on any concerns raised by the judge.

The judge reviews the final Section 702 application and may set a hearing if he or she has additional questions about it. If the judge finds (based on the written submission alone or the written submission in combination with a hearing) that the certification contains all of the required elements, and that the targeting and minimization procedures adopted in accordance with 50 U.S.C. §§ 1881a(d) & (e) are consistent with the requirements of those subsections and with the Fourth Amendment to the Constitution of the United States, the judge enters an order approving the certification in accordance with 50 U.S.C. § 1881a(i)(3)(A). As required by 50 U.S.C. § 1881a(i)(3)(C), the judge also issues an opinion in support of the order. If the judge finds that the certification does not contain the required elements or the targeting and minimization procedures are inconsistent with the requirements of 50 U.S.C. §§ 1881a(d) & (e), or the Fourth Amendment, the judge will, pursuant to 50 U.S.C. § 1881a(i)(3)(B), issue an order directing the government to, at the government's election and to the extent required by the Court's order, either correct any deficiency identified by the Court's order not later than 30 days after the date on which the Court issues the order, or cease, or not begin, the implementation of the authorization for which the certification was submitted. Subsequent review of any remedial measures taken by the government may then be required and may result in another order and opinion pursuant to 50 U.S.C. § 1881a(i).

2. *When considering such applications and submissions, please describe the interaction between the government and the Court (including both judges and court staff), including any hearings, meetings, or other means through which the Court has the opportunity to ask questions or seek additional information from the government. Please describe how frequently such exchanges occur, and generally what types of additional information that the Court might request of the government, if any. Please also describe how frequently the Court asks the government to make changes to its applications and submissions before ruling.*

The process through which the Court interacts with the government in reviewing proposed applications, seeking additional information, conveying Court concerns, and adjudicating final applications, is very similar to the process employed by other federal courts in considering applications for wiretap orders under Title III (discussed in notes 2 and 6 above).

Under FISA practice, the first set of interactions often take place at the staff level. The Court's legal staff frequently interacts with the government in various ways in the context of

examining the legal sufficiency of applications before they are presented in final form to a judge. Indeed, in the process of reviewing the government's applications and submissions in order to provide advice to the judge, the legal staff interact with the government on a daily basis. These daily interactions typically consist of secure telephone conversations in which legal staff ask the government questions about the legal and factual elements of applications or submissions. These questions may originate with legal staff after an initial review of an application or submission, or they may come from a judge.

At the direction of the Presiding Judge or the judge assigned to a matter, Court legal staff sometimes meet with the government in connection with applications and submissions. The Court typically requests such meetings when a proposed application or submission presents a special legal or factual concern about which the Court would like additional information (e.g., a novel use of technology or a request to use a new surveillance or search technique). The frequency of such meetings varies depending on the Court's assessment of its need for additional information in matters before it and the most conducive means to obtain that information. Court legal staff may meet with the government as often as 2-3 times a week, or as few as 1-2 times a month, in connection with the various matters pending before the Court.

Pursuant to 50 U.S.C. § 1803(a)(2)(A) and Rule 17(a) of the FISC Rules of Procedure, the Court also holds hearings in cases in which a judge assesses that he or she needs additional information in order to rule on a matter. The frequency of hearings varies depending on the nature and complexity of matters pending before the Court at a given time, and also, to some extent, based on the individual preferences of different judges. Hearings are attended, at a minimum, by the Department of Justice attorney who prepared the application and a fact witness from the agency seeking the Court's authorization.

The types of additional information sought from the government – through telephone conversations, meetings, or hearings – include, but are not limited to, the following: additional facts to justify the government's belief that its application meets the legal requirements for the type of authority it is seeking (e.g., in the case of electronic surveillance, that might include additional information to justify the government's belief that a target of surveillance is a foreign power or an agent of a foreign power, as required by 50 U.S.C. § 1804(a)(3)(A), or that the target is using or about to use a particular facility, as required by 50 U.S.C. § 1804(a)(3)(B)); additional facts about how the government intends to implement statutorily required minimization procedures (see, e.g., 50 U.S.C. §§ 1801(h); 1805(a)(3); 1824(a)(3); 1861(c)(1); 1881a(i)(3)(A); and 1881c(c)(1)(c)); additional information about the government's prior implementation of a Court order, particularly if the government has previously failed to comply fully with a Court order; or additional information about novel issues of technology or law (see Rule 11 of FISC Rules of Procedure).

In a typical week, the Court seeks additional information or modifies the terms proposed

by the government in a significant percentage of cases.[9] (The Court has recently initiated the process of tracking more precisely how frequently this occurs.) The judge may determine, for example, that he or she cannot make the necessary findings under the statute without the addition of information to the application, or that he or she can approve only some of the authorities sought through the application. The government then has the choice to alter its final application or proposed orders in response to the judge's concerns; request a hearing to address those concerns; submit a final application without changes; or elect not to proceed at all with a final application. If the government files a final application, the Court may, on its own, make changes to the government's proposed orders (or issue totally redrafted orders) to address the judge's concern about a given application. The judge may choose, for example, to make an authorization of a shorter duration than what was requested by the government, or the judge may issue a Supplemental Order imposing special reporting or minimization requirements on the government's implementation of an authorization.

3. *Public FISA Court opinions and orders make clear that the Court has considered the views of non-governmental parties in certain cases, including a provider challenge to the Protect America Act of 2007. Describe instances where non-governmental parties have appeared before the Court. Has the Court invited or heard views from a nongovernmental party regarding applications or submissions under Title I, Title V, or Title VII of FISA? If so, how did this come about, and what was the process or mechanism that the Court used to enable such views to be considered?*

FISA does not provide a mechanism for the Court to invite the views of nongovernmental parties. In fact, the Court's proceedings are *ex parte* as required by the statute (see, e.g., 50 U.S.C. §§ 1805(a), 1824(a), 1842(d)(1) & 1861(c)(1)), and in keeping with the procedures followed by other courts in applications for search warrants and wiretap orders. Nevertheless, the statute and the FISC Rules of Procedure provide multiple opportunities for recipients of Court orders or government directives to challenge those orders or directives, either directly or through refusal to comply with orders or directives. Additionally, as detailed below, there have been several instances – particularly in the past several months – in which nongovernmental parties have appeared before the Court outside of the context of a challenge to an individual Court order or government directive.

There has been one instance in which the Court heard arguments from a nongovernmental party that sought to substantively contest a directive from the government. Specifically, in 2007, the government issued directives to Yahoo!, Inc. (Yahoo) pursuant to Section 105B of the Protect America Act of 2007 (PAA). Yahoo refused to comply with the directives, and the government

[9] This assessment does not include minor technical or typographical changes, which occur more frequently.

filed a motion with this Court to compel compliance. The Court ordered and received briefing from both parties, and rendered a decision in April 2008.[10]

As noted above, the FISC Rules of Procedure and the FISA statute provide opportunities for the appearance of nongovernmental parties before the Court in matters pending pursuant to Titles I, V and VII of the statute. For example, Rule 19(a) of the FISC Rules of Procedure provides that if a person or entity served with a Court order fails to comply with that order, the government may file a motion for an order to show cause why the recipient should not be held in contempt and sanctioned accordingly. Thus, a nongovernmental party served with an order may invite an opportunity to be heard by the Court through refusal to comply with an order.

With respect to applications filed under Title V of FISA, 50 U.S.C. § 1861(f)(2)(A)(i) provides that a person receiving a production order may challenge the legality of that order by filing a petition with the Court. The same section of the statute provides that the recipient of a production order may challenge the non-disclosure order imposed in connection with a production order by filing a petition to modify or set aside the nondisclosure order. Rules 33-36 of the FISC Rules of Procedure delineate the procedures and requirements for filing such petitions, including the time limits on such challenges. To date, no recipient of a production order has opted to invoke this section of the statute.

With respect to applications filed under Title VII of FISA, 50 U.S.C. § 1881a(h)(4)(A) provides that an electronic communication service provider who receives a directive pursuant to Section 702 may file a petition to modify or set aside the directive with the Court. Sections 1881a(h)(4)(A)-(G) of the statute, as well as Rule 28 of the FISC Rules of Procedure, delineate

---

[10] Yahoo thereafter appealed the Court's decision to the Foreign Intelligence Surveillance Court of Review (FISCR). See *In re Directives [redacted] Pursuant to Section 105b of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008). This is not the only instance in which a nongovernmental entity has appeared before the FISCR. In 2002, the FISCR accepted briefs filed by the ACLU and the National Association of Criminal Defense Lawyers as *amici curiae* in *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

While Yahoo's identity as the provider that challenged these directives was previously under seal pursuant to the FISCR's decision in *In re Directives*, 551 F.3d 1004, 1016-18, the FISCR issued an Order on June 26, 2013, indicating that it does not object to the release of Yahoo's identity, and ordering, among other things, a new declassification review of the FISCR's opinion in *In re Directives*. The FISCR issued this order in response to a motion by Yahoo's counsel, and after receiving briefing by Yahoo and the government. Yahoo also recently filed a motion for publication of the Court's decision that was appealed to the FISCR, resulting in the published opinion in *In re Directives*. The Court granted the motion. Documents related to Yahoo's recent motion to this Court are available at http://www.uscourts.gov/uscourts/courts/fisc/index.html under Docket No. 105B(g) 07-01.

the procedures and requirements for such challenges. Relatedly, 50 U.S.C. § 1881a(h)(5)(A) provides that if an electronic communication service provider fails to comply with a directive issued under Section 702, the Attorney General may file a petition with the Court for an order to compel compliance, which would likely result in the service provider's appearance before the Court through its legal representatives. (Section 1881a(h)(5), as well as Rule 29 of the FISC Rules of Procedure, provide further detail on the procedures and requirements for the enforcement of Section 702 directives.) Finally, 50 U.S.C. § 1881a(h)(6) and Rule 31 of the FISC Rules of Procedure allow for the government or an electronic communication service provider to appeal an order of this Court under §§ 1881a(h)(4) or (5) to the FISCR. To date, no electronic communication service provider has opted to challenge a directive issued pursuant to Section 702, although, as noted above, Yahoo refused to comply with government directives issued under the PAA, which resulted in the government invoking a provision under that statute to compel compliance.

As noted above, there have been a number of other instances in which nongovernmental parties have appeared before the Court outside of the context of a direct challenge to a court order or a government directive, particularly recently. Those instances are as follows:

In August 2007, the American Civil Liberties Union (ACLU) filed a motion with the Court for the release of certain records. The Court ordered and received briefing on the matter from the ACLU and the government, and rendered a decision in December 2007. See *In re Motion for Release of Court Records*, 526 F. Supp. 2d 484 (FISA Ct. 2007).

On May 23, 2013, the Electronic Frontier Foundation (EFF) filed a motion with this Court for consent to disclosure of court records, or in the alternative, a determination of the effect of the Court's rules on access rights under the Freedom of Information Act. Following briefing by EFF and the government, the Court issued an Opinion and Order on June 12, 2013. All documents filed in this docket are available at http://www.uscourts.gov/uscourts/courts/fisc/index.html under Case No. Misc. 13-01.

On June 12, 2013, the ACLU, the American Civil Liberties Union of the Nation's Capital, and the Media Freedom and Information Access Clinic (Movants) filed a motion with this Court for the release of Court records. The Court ordered and has received briefing on the matter from the Movants and the government. On July 18, 2013, the Court granted the motions of (1) sixteen members of the House of Representatives and (2) a coalition of news media organizations for leave to file *amicus curiae* briefs in this case. The matter is pending before the Court. All documents filed in this docket are available at http://www.uscourts.gov/uscourts/courts/fisc/index.html under Case No. Misc. 13-02.

On June 18, 2013, Google, Inc. filed a motion with this Court for declaratory judgment of the company's first amendment right to publish aggregate information about FISA orders. The

court ordered briefing on the matter. On July 18, 2013, the Court granted the motions of (1) a coalition of news media organizations and (2) the First Amendment Coalition, the ACLU, the Center for Democracy and Technology, the EFF, and Techfreedom for leave to file *amicus curiae* briefs in this case. The matter is pending before the Court. All documents filed in this docket are available at http://www.uscourts.gov/uscourts/courts/fisc/index.html under Case No. Misc. 13-03.

On June 19, 2013, Microsoft Corporation filed a motion in this Court for declaratory judgment or other appropriate relief authorizing disclosure of aggregate data regarding any FISA orders it has received. The court ordered briefing on the matter. On July 18, 2013, the Court granted the motions of (1) a coalition of news media organizations and (2) the First Amendment Coalition, the ACLU, the Center for Democracy and Technology, the EFF, and Techfreedom for leave to file *amicus curiae* briefs in this case. The matter is pending before the Court. All documents filed in this docket are available at http://www.uscourts.gov/uscourts/courts/fisc/index.html under Case No. Misc. 13-04.

4. *Please describe the process used by the Court to consider and resolve any instances where the government notifies the Court of compliance concerns with any of the FISA authorities.*

Pursuant to 50 U.S.C. § 1803(h), the Court is empowered to ensure compliance with its orders. Additionally, Rule 13(a) of the FISC Rules of Procedure requires the government to file a written notice with the Court immediately upon discovering that any authority or approval granted by the Court has been implemented (either by government officials or others operating pursuant to Court order) in a manner that did not comply with the Court's authorization or approval or with applicable law. Rule 13(a) also requires the government to notify the Court in writing of the facts and circumstances relevant to the non-compliance; any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and how the government proposes to dispose of or treat any information obtained as a result of the non-compliance.

When the government discovers instances of non-compliance, it files notices with the Court as required by Rule 13(a). Because the rule requires the government to "immediately inform the Judge" of a compliance incident, the government typically files a preliminary notice that provides whatever facts are available at the time an incident is discovered. The legal staff review these notices as they are received and call significant matters to the attention of the appropriate judge. In instances in which the non-compliance has not been fully addressed by the time the preliminary Rule 13(a) notice is filed, the Court may seek additional information through telephone calls, meetings, or hearings. Typically, the government will file a final Rule 13(a) notice once the relevant facts are known and any unauthorized collection has been destroyed. However, judges sometimes issue orders directing the government to take specific

actions to address instances of non-compliance either before or after a final notice is filed, and, less frequently, to cease a course of action that the Court considers non-compliant. This process is followed for compliance issues in all matters, including matters handled under Title V and Section 702.

I hope these responses are helpful to the Senate Judiciary Committee in its deliberations.

Sincerely,

Reggie B. Walton
Presiding Judge

Identical letter sent to: Honorable Patrick J. Leahy

TO THE BENCH, BAR AND PUBLIC:

The attached *Rules of Procedure* for the Foreign Intelligence Surveillance Court supersede both the February 17, 2006 *Rules of Procedure* and the May 5, 2006 *Procedures for Review of Petitions Filed Pursuant to Section 501(f) of the Foreign Intelligence Surveillance Act of 1978, As Amended.* These revised *Rules of Procedure* are effective immediately.

John D. Bates
Presiding Judge
Foreign Intelligence Surveillance Court

November 1, 2010

UNITED STATES FOREIGN
INTELLIGENCE SURVEILLANCE COURT
Washington, D.C.

RULES OF PROCEDURE

Effective November 1, 2010

Rule **Page**

Title I. Scope of Rules; Amendment

1. Scope of Rules 1
2. Amendment 1

Title II. National Security Information

3. National Security Information 1

Title III. Structure and Powers of the Court

4. Structure 1
5. Authority of the Judges 1

Title IV. Matters Presented to the Court

6. Means of Requesting Relief from the Court 2
7. Filing Applications, Certifications, Petitions, Motions, or Other Papers ("Submissions") 2
8. Service 3
9. Time and Manner of Submission of Applications 3
10. Computation of Time 4
11. Notice and Briefing of Novel Issues 4
12. Submission of Targeting and Minimization Procedures 5
13. Correction of Misstatement or Omission; Disclosure of Non-Compliance 5
14. Motions to Amend Court Orders 5
15. Sequestration 5
16. Returns 6

Title V. Hearings, Orders, and Enforcement

17. Hearings 6
18. Court Orders 6
19. Enforcement of Orders 7

Title VI. Supplemental Procedures for Proceedings Under 50 U.S.C. § 1881a(h)

20. Scope 7
21. Petition to Modify or Set Aside a Directive 7
22. Petition to Compel Compliance With a Directive 7
23. Contents of Petition 8
24. Response 8
25. Length of Petition and Response; Other Papers 8
26. Notification of Presiding Judge 8
27. Assignment 8
28. Review of Petition to Modify or Set Aside a Directive 9
29. Review of Petition to Compel Compliance Pursuant to 50 U.S.C. § 1881a(h)(5)(C) 9
30. *In Camera* Review 9
31. Appeal 9

Title VII. Supplemental Procedures for Proceedings Under 50 U.S.C. § 1861(f)

32. Scope 10
33. Petition Challenging Production or Nondisclosure Order 10
34. Contents of Petition 10
35. Length of Petition 10
36. Request to Stay Production 10
37. Notification of Presiding Judge 10
38. Assignment 11
39. Initial Review 11
40. Response to Petition; Other Papers 11
41. Rulings on Non-frivolous Petitions 11
42. Failure to Comply 12
43. *In Camera* Review 12
44. Appeal 12

Title VIII. En Banc Proceedings

45. Standard for Hearing or Rehearing En Banc 12
46. Initial Hearing En Banc on Request of a Party 12
47. Rehearing En Banc on Petition by a Party 12
48. Circulation of En Banc Petitions and Responses 13
49. Court-Initiated En Banc Proceedings 13
50. Polling 13
51. Stay Pending En Banc Review 13
52. Supplemental Briefing 13
53. Order Granting or Denying En Banc Review 13

Title IX. Appeals

54. How Taken 14
55. When Taken 14
56. Stay Pending Appeal 14
57. Motion to Transmit the Record 14
58. Transmitting the Record 14
59. Oral Notification to the Court of Review 14

Title X. Administrative Provisions

60. Duties of the Clerk 14
61. Office Hours 15
62. Release of Court Records 15
63. Practice Before Court 15

Title I. Scope of Rules; Amendment

Rule 1. Scope of Rules. These rules, which are promulgated pursuant to 50 U.S.C. § 1803(g), govern all proceedings in the Foreign Intelligence Surveillance Court ("the Court"). Issues not addressed in these rules or the Foreign Intelligence Surveillance Act, as amended ("the Act"), may be resolved under the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure.

Rule 2. Amendment. Any amendment to these rules must be promulgated in accordance with 28 U.S.C. § 2071.

Title II. National Security Information

Rule 3. National Security Information. In all matters, the Court and its staff shall comply with the security measures established pursuant to 50 U.S.C. §§ 1803(c), 1822(e), 1861(f)(4), and 1881a(k)(1), as well as Executive Order 13526, "Classified National Security Information" (or its successor). Each member of the Court's staff must possess security clearances at a level commensurate to the individual's responsibilities.

Title III. Structure and Powers of the Court

Rule 4. Structure.

(a) Composition. In accordance with 50 U.S.C. § 1803(a), the Court consists of United States District Court Judges appointed by the Chief Justice of the United States.

(b) Presiding Judge. The Chief Justice designates the "Presiding Judge."

Rule 5. Authority of the Judges.

(a) Scope of Authority. Each Judge may exercise the authority vested by the Act and such other authority as is consistent with Article III of the Constitution and other statutes and laws of the United States, to the extent not inconsistent with the Act.

(b) Referring Matters to Other Judges. Except for matters involving a denial of an application for an order, a Judge may refer any matter to another Judge of the Court with that Judge's consent. If a Judge directs the government to supplement an application, the Judge may direct the government to present the renewal of that application to the same Judge. If a matter is presented to a Judge who is unavailable or whose tenure on the Court expires while the matter is pending, the Presiding Judge may re-assign the matter.

(c) Supplementation. The Judge before whom a matter is pending may order a party to furnish any information that the Judge deems necessary.

Title IV. Matters Presented to the Court

Rule 6. Means of Requesting Relief from the Court.

(a) Application. The government may, in accordance with 50 U.S.C. §§ 1804, 1823, 1842, 1861, 1881b(b), 1881c(b), or 1881d(a), file an application for a Court order ("application").

(b) Certification. The government may, in accordance with 50 U.S.C. § 1881a(g), file a certification concerning the targeting of non-United States persons reasonably believed to be located outside the United States ("certification").

(c) Petition. A party may, in accordance with 50 U.S.C. §§ 1861(f) and 1881a(h) and the Supplemental Procedures in Titles VI and VII of these Rules, file a petition for review of a production or nondisclosure order issued under 50 U.S.C. § 1861 or for review or enforcement of a directive issued under 50 U.S.C. § 1881a ("petition").

(d) Motion. A party seeking relief, other than pursuant to an application, certification, or petition permitted under the Act and these Rules, must do so by motion ("motion").

Rule 7. Filing Applications, Certifications, Petitions, Motions, or Other Papers ("Submissions").

(a) Filing. A submission is filed by delivering it to the Clerk or as otherwise directed by the Clerk in accordance with Rule 7(k).

(b) Original and One Copy. Except as otherwise provided, a signed original and one copy must be filed with the Clerk.

(c) Form. Unless otherwise ordered, all submissions must be:

(1) on 8½-by-11-inch opaque white paper; and

(2) typed (double-spaced) or reproduced in a manner that produces a clear black image.

(d) Electronic Filing. The Clerk, when authorized by the Court, may accept and file submissions by any reliable, and appropriately secure, electronic means.

(e) Facsimile or Scanned Signature. The Clerk may accept for filing a submission bearing a facsimile or scanned signature in lieu of the original signature. Upon acceptance, a submission bearing a facsimile or scanned signature is the original Court record.

(f) Citations. Each submission must contain citations to pertinent provisions of the Act.

(g) Contents. Each application and certification filed by the government must be approved and certified in accordance with the Act, and must contain the statements and other information required by the Act.

(h) Contact Information in Adversarial Proceedings.

(1) Filing by a Party Other Than the Government. A party other than the government must include in the initial submission the party's full name, address, and telephone number, or, if the party is represented by counsel, the full name of the party and the party's counsel, as well as counsel's address, telephone number, facsimile number, and bar membership information.

(2) Filing by the Government. In an adversarial proceeding, the initial

submission filed by the government must include the full names of the attorneys representing the United States and their mailing addresses, telephone numbers, and facsimile numbers.

(i) Information Concerning Security Clearances in Adversarial Proceedings. A party other than the government must:

(1) state in the initial submission whether the party (or the party's responsible officers or employees) and counsel for the party hold security clearances;

(2) describe the circumstances in which such clearances were granted; and

(3) identify the federal agencies granting the clearances and the classification levels and compartments involved.

(j) *Ex Parte* Review. At the request of the government in an adversarial proceeding, the Judge must review *ex parte* and *in camera* any submissions by the government, or portions thereof, which may include classified information. Except as otherwise ordered, if the government files *ex parte* a submission that contains classified information, the government must file and serve on the non-governmental party an unclassified or redacted version. The unclassified or redacted version, at a minimum, must clearly articulate the government's legal arguments.

(k) Instructions for Delivery to the Court. A party may obtain instructions for making submissions permitted under the Act and these Rules by contacting the Clerk at (202) 357-6250.

Rule 8. Service.

(a) By a Party Other than the Government. A party other than the government must, at or before the time of filing a submission permitted under the Act and these Rules, serve a copy on the government. Instructions for effecting service must be obtained by contacting the Security and Emergency Planning Staff, United States Department of Justice, by telephone at (202) 514-2094.

(b) By the Government. At or before the time of filing a submission in an adversarial proceeding, the government must, subject to Rule 7(j), serve a copy by hand delivery or by overnight delivery on counsel for the other party, or, if the party is not represented by counsel, on the party directly.

(c) Certificate of Service. A party must include a certificate of service specifying the time and manner of service.

Rule 9. Time and Manner of Submission of Applications.

(a) Proposed Applications. Except when an application is being submitted following an emergency authorization pursuant to 50 U.S.C. §§ 1805(e), 1824(e), 1843, 1881b(d), or 1881c(d) ("emergency authorization"), or as otherwise permitted by the Court, proposed applications must be submitted by the government no later than seven days before the government seeks to have the matter entertained by the Court. Proposed applications submitted following an emergency authorization must be submitted as soon after such authorization as is reasonably practicable.

(b) Final Applications. Unless the Court permits otherwise, the final application,

including all signatures, approvals, and certifications required by the Act, must be filed no later than 10:00 a.m. Eastern Time on the day the government seeks to have the matter entertained by the Court.

(c) Proposed Orders. Each proposed application and final application submitted to the Court must include any pertinent proposed orders.

(d) Number of Copies. Notwithstanding Rule 7(b), unless the Court directs otherwise, only one copy of a proposed application must be submitted and only the original final application must be filed.

(e) Notice of Changes. No later than the time the final application is filed, the government must identify any differences between the final application and the proposed application.

Rule 10. Computation of Time. The following rules apply in computing a time period specified by these Rules or by Court order:

(a) Day of the Event Excluded. Exclude the day of the event that triggers the period.

(b) Compute Time Using Calendar Days. Compute time using calendar days, not business days.

(c) Include the Last Day. Include the last day of the period; but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday.

Rule 11. Notice and Briefing of Novel Issues.

(a) Notice to the Court. If a submission by the government for Court action involves an issue not previously presented to the Court — including, but not limited to, a novel issue of technology or law — the government must inform the Court in writing of the nature and significance of that issue.

(b) Submission Relating to New Techniques. Prior to requesting authorization to use a new surveillance or search technique, the government must submit a memorandum to the Court that:

(1) explains the technique;

(2) describes the circumstances of the likely implementation of the technique;

(3) discusses any legal issues apparently raised; and

(4) describes the proposed minimization procedures to be applied.

At the latest, the memorandum must be submitted as part of the first proposed application or other submission that seeks to employ the new technique.

(c) Novel Implementation. When requesting authorization to use an existing surveillance or search technique in a novel context, the government must identify and address any new minimization or other issues in a written submission made, at the latest, as part of the application or other filing seeking such authorization.

(d) Legal Memorandum. If an application or other request for action raises an issue of law not previously considered by the Court, the government must file a memorandum of law in support of its position on each new issue. At the latest, the memorandum must be

submitted as part of the first proposed application or other submission that raises the issue.

Rule 12. Submission of Targeting and Minimization Procedures. In a matter involving Court review of targeting or minimization procedures, such procedures may be set out in full in the government's submission or may be incorporated by reference to procedures approved in a prior docket. Procedures that are incorporated by reference to a prior docket may be supplemented, but not otherwise modified, in the government's submission. Otherwise, proposed procedures must be set forth in a clear and self-contained manner, without resort to cross-referencing.

Rule 13. Correction of Misstatement or Omission; Disclosure of Non-Compliance.

(a) Correction of Material Facts. If the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing, must immediately inform the Judge to whom the submission was made of:

(1) the misstatement or omission;

(2) any necessary correction;

(3) the facts and circumstances relevant to the misstatement or omission;

(4) any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and

(5) how the government proposes to dispose of or treat any information obtained as a result of the misstatement or omission.

(b) Disclosure of Non-Compliance. If the government discovers that any authority or approval granted by the Court has been implemented in a manner that did not comply with the Court's authorization or approval or with applicable law, the government, in writing, must immediately inform the Judge to whom the submission was made of:

(1) the non-compliance;

(2) the facts and circumstances relevant to the non-compliance;

(3) any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and

(4) how the government proposes to dispose of or treat any information obtained as a result of the non-compliance.

Rule 14. Motions to Amend Court Orders. Unless the Judge who issued the order granting an application directs otherwise, a motion to amend the order may be presented to any other Judge.

Rule 15. Sequestration. Except as required by Court-approved minimization procedures, the government must not submit material for sequestration with the Court without the prior approval of the Presiding Judge. To obtain such approval, the government must, prior to tendering the material to the Court for sequestration, file a motion stating the circumstances of the material's acquisition and explaining why it is necessary for such material to be retained in the custody of the Court.

Rule 16. Returns.

(a) Time for Filing.

(1) Search Orders. Unless the Court directs otherwise, a return must be made and filed either at the time of submission of a proposed renewal application or within 90 days of the execution of a search order, whichever is sooner.

(2) Other Orders. The Court may direct the filing of other returns at a time and in a manner that it deems appropriate.

(b) Contents. The return must:

(1) notify the Court of the execution of the order;

(2) describe the circumstances and results of the search or other activity including, where appropriate, an inventory;

(3) certify that the execution was in conformity with the order or describe and explain any deviation from the order; and

(4) include any other information as the Court may direct.

Title V. Hearings, Orders, and Enforcement

Rule 17. Hearings.

(a) Scheduling. The Judge to whom a matter is presented or assigned must determine whether a hearing is necessary and, if so, set the time and place of the hearing.

(b) ***Ex Parte.*** Except as the Court otherwise directs or the Rules otherwise provide, a hearing in a non-adversarial matter must be *ex parte* and conducted within the Court's secure facility.

(c) Appearances. Unless excused, the government official providing the factual information in an application or certification and an attorney for the applicant must attend the hearing, along with other representatives of the government, and any other party, as the Court may direct or permit.

(d) Testimony; Oath; Recording of Proceedings. A Judge may take testimony under oath and receive other evidence. The testimony may be recorded electronically or as the Judge may otherwise direct, consistent with the security measures referenced in Rule 3.

Rule 18. Court Orders.

(a) Citations. All orders must contain citations to pertinent provisions of the Act.

(b) Denying Applications.

(1) Written Statement of Reasons. If a Judge denies the government's application, the Judge must immediately provide a written statement of each reason for the decision and cause a copy of the statement to be served on the government.

(2) Previously Denied Application. If a Judge denies an application or other request for relief by the government, any subsequent submission on the matter must be referred to that Judge.

(c) Expiration Dates. An expiration date in an order must be stated using Eastern Time and must be computed from the date and time of the Court's issuance of the order, or, if applicable, of an emergency authorization.

(d) Electronic Signatures. The Judge may sign an order by any reliable, appropriately secure electronic means, including facsimile.

Rule 19. Enforcement of Orders.

(a) Show Cause Motions. If a person or entity served with a Court order (the "recipient") fails to comply with that order, the government may file a motion for an order to show cause why the recipient should not be held in contempt and sanctioned accordingly. The motion must be presented to the Judge who entered the underlying order.

(b) Proceedings.

(1) An order to show cause must:

(i) confirm that the underlying order was issued;

(ii) schedule further proceedings; and

(iii) afford the recipient an opportunity to show cause why the recipient should not be held in contempt.

(2) A Judge must conduct any proceeding on a motion to show cause *in camera*. The Clerk must maintain all records of the proceedings in conformance with 50 U.S.C. § 1803(c).

(3) If the recipient fails to show cause for noncompliance with the underlying order, the Court may find the recipient in contempt and enter any order it deems necessary and appropriate to compel compliance and to sanction the recipient for noncompliance with the underlying order.

(4) If the recipient shows cause for noncompliance or if the Court concludes that the order should not be enforced as issued, the Court may enter any order it deems appropriate.

Title VI. Supplemental Procedures for Proceedings Under 50 U.S.C. § 1881a(h)

Rule 20. Scope. Together with the generally-applicable provisions of these Rules concerning filing, service, and other matters, these supplemental procedures apply in proceedings under 50 U.S.C. § 1881a(h).

Rule 21. Petition to Modify or Set Aside a Directive. An electronic communication service provider ("provider"), who receives a directive issued under 50 U.S.C. § 1881a(h)(1), may file a petition to modify or set aside such directive under 50 U.S.C. § 1881a(h)(4). A petition may be filed by the provider's counsel.

Rule 22. Petition to Compel Compliance With a Directive. In the event a provider fails to comply with a directive issued under 50 U.S.C. § 1881a(h)(1), the government may, pursuant to 50 U.S.C. § 1881a(h)(5), file a petition to compel compliance with the directive.

Rule 23. Contents of Petition. The petition must:

(a) state clearly the relief being sought;

(b) state concisely the factual and legal grounds for modifying, setting aside, or compelling compliance with the directive at issue;

(c) include a copy of the directive and state the date on which the directive was served on the provider; and

(d) state whether a hearing is requested.

Rule 24. Response.

(a) By Government. The government may, within seven days following notification under Rule 28(b) that plenary review is necessary, file a response to a provider's petition.

(b) By Provider. The provider may, within seven days after service of a petition by the government to compel compliance, file a response to the petition.

Rule 25. Length of Petition and Response; Other Papers.

(a) Length. Unless the Court directs otherwise, a petition and response each must not exceed 20 pages in length, including any attachments (other than a copy of the directive at issue).

(b) Other papers. No supplements, replies, or sur-replies may be filed without leave of the Court.

Rule 26. Notification of Presiding Judge. Upon receipt, the Clerk must notify the Presiding Judge that a petition to modify, set aside, or compel compliance with a directive issued under 50 U.S.C. § 1881a(h)(1) has been filed. If the Presiding Judge is not reasonably available when the Clerk receives a petition, the Clerk must notify each of the local Judges, in order of seniority on the Court, and, if necessary, each of the other Judges, in order of seniority on the Court, until a Judge who is reasonably available has received notification. The reasonably available Judge who receives notification will be the acting Presiding Judge ("Presiding Judge") for the case.

Rule 27. Assignment.

(a) Presiding Judge. As soon as possible after receiving notification from the Clerk that a petition has been filed, and no later than 24 hours after the filing of the petition, the Presiding Judge must assign the matter to a Judge in the petition review pool established by 50 U.S.C. § 1803(e)(1). The Clerk must record the date and time of the assignment.

(b) Transmitting Petition. The Clerk must transmit the petition to the assigned Judge as soon as possible but no later than 24 hours after being notified of the assignment by the Presiding Judge.

Rule 28. Review of Petition to Modify or Set Aside a Directive.

(a) Initial Review Pursuant to 50 U.S.C. § 1881a(h)(4)(D).

(1) A Judge must conduct an initial review of a petition to modify or set aside a directive within five days after being assigned such petition.

(2) If the Judge determines that the provider's claims, defenses, or other legal contentions are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the Judge must promptly deny such petition, affirm the directive, and order the provider to comply with the directive. Upon making such determination or promptly thereafter, the Judge must provide a written statement of reasons. The Clerk must transmit the ruling and statement of reasons to the provider and the government.

(b) Plenary Review Pursuant to 50 U.S.C. § 1881a(h)(4)(E).

(1) If the Judge determines that the petition requires plenary review, the Court must promptly notify the parties. The Judge must provide a written statement of reasons for the determination.

(2) The Judge must affirm, modify, or set aside the directive that is the subject of the petition within the time permitted under 50 U.S.C. §§ 1881a(h)(4)(E) and 1881a(j)(2).

(3) The Judge may hold a hearing or conduct proceedings solely on the papers filed by the provider and the government.

(c) Burden. Pursuant to 50 U.S.C. § 1881a(h)(4)(C), a Judge may grant the petition only if the Judge finds that the challenged directive does not meet the requirements of 50 U.S.C. § 1881a or is otherwise unlawful.

(d) Continued Effect. Pursuant to 50 U.S.C. § 1881a(h)(4)(F), any directive not explicitly modified or set aside by the Judge remains in full effect.

Rule 29. Review of Petition to Compel Compliance Pursuant to 50 U.S.C. § 1881a(h)(5)(C).

(a) The Judge reviewing the government's petition to compel compliance with a directive must, within the time permitted under 50 U.S.C. §§ 1881a(h)(5)(C) and 1881a(j)(2), issue an order requiring the provider to comply with the directive or any part of it, as issued or as modified, if the Judge finds that the directive meets the requirements of 50 U.S.C. § 1881a and is otherwise lawful.

(b) The Judge must provide a written statement of reasons for the determination. The Clerk must transmit the ruling and statement of reasons to the provider and the government.

Rule 30. *In Camera* Review. Pursuant to 50 U.S.C. § 1803(e)(2), the Court must review a petition under 50 U.S.C. § 1881a(h) and conduct related proceedings *in camera*.

Rule 31. Appeal. Pursuant to 50 U.S.C. § 1881a(h)(6) and subject to Rules 54 through 59 of these Rules, the government or the provider may petition the Foreign Intelligence Surveillance Court of Review ("Court of Review") to review the Judge's ruling.

Title VII. Supplemental Procedures for Proceedings Under 50 U.S.C. § 1861(f)

Rule 32. Scope. Together with the generally-applicable provisions of these Rules regarding filing, service, and other matters, these supplemental procedures apply in proceedings under 50 U.S.C. § 1861(f).

Rule 33. Petition Challenging Production or Nondisclosure Order.

(a) Who May File. The recipient of a production order or nondisclosure order under 50 U.S.C. § 1861 ("petitioner") may file a petition challenging the order pursuant to 50 U.S.C. § 1861(f). A petition may be filed by the petitioner's counsel.

(b) Time to File Petition.

(1) Challenging a Production Order. The petitioner must file a petition challenging a production order within 20 days after the order has been served.

(2) Challenging a Nondisclosure Order. A petitioner may not file a petition challenging a nondisclosure order issued under 50 U.S.C. § 1861(d) earlier than one year after the order was entered.

(3) Subsequent Petition Challenging a Nondisclosure Order. If a Judge denies a petition to modify or set aside a nondisclosure order, the petitioner may not file a subsequent petition challenging the same nondisclosure order earlier than one year after the date of the denial.

Rule 34. Contents of Petition. A petition must:

(a) state clearly the relief being sought;

(b) state concisely the factual and legal grounds for modifying or setting aside the challenged order;

(c) include a copy of the challenged order and state the date on which it was served on the petitioner; and

(d) state whether a hearing is requested.

Rule 35. Length of Petition. Unless the Court directs otherwise, a petition may not exceed 20 pages in length, including any attachments (other than a copy of the challenged order).

Rule 36. Request to Stay Production.

(a) Petition Does Not Automatically Effect a Stay. A petition does not automatically stay the underlying order. A production order will be stayed only if the petitioner requests a stay and the Judge grants such relief.

(b) Stay May Be Requested Prior to Filing of a Petition. A petitioner may request the Court to stay the production order before filing a petition challenging the order.

Rule 37. Notification of Presiding Judge. Upon receipt, the Clerk must notify the Presiding Judge that a petition challenging a production or nondisclosure order has been filed. If the Presiding Judge is not reasonably available when the Clerk receives the petition, the Clerk must

notify each of the local Judges, in order of seniority on the Court, and, if necessary, each of the other Judges, in order of seniority on the Court, until a Judge who is reasonably available has received notification. The reasonably available Judge who receives notification will be the acting Presiding Judge ("Presiding Judge") for the case.

Rule 38. Assignment.

(a) Presiding Judge. Immediately after receiving notification from the Clerk that a petition has been filed, the Presiding Judge must assign the matter to a Judge in the petition pool established by 50 U.S.C. § 1803(e)(1). The Clerk must record the date and time of the assignment.

(b) Transmitting Petition. The Clerk must transmit the petition to the assigned Judge as soon as possible but no later than 24 hours after being notified of the assignment by the Presiding Judge.

Rule 39. Initial Review.

(a) When. The Judge must review the petition within 72 hours after being assigned the petition.

(b) Frivolous Petition. If the Judge determines that the petition is frivolous, the Judge must:

(1) immediately deny the petition and affirm the challenged order;

(2) promptly provide a written statement of the reasons for the denial; and

(3) provide a written ruling, together with the statement of reasons, to the Clerk, who must transmit the ruling and statement of reasons to the petitioner and the government.

(c) Non-Frivolous Petition.

(1) Scheduling. If the Judge determines that the petition is not frivolous, the Judge must promptly issue an order that sets a schedule for its consideration. The Clerk must transmit the order to the petitioner and the government.

(2) Manner of Proceeding. The judge may hold a hearing or conduct the proceedings solely on the papers filed by the petitioner and the government.

Rule 40. Response to Petition; Other Papers.

(a) Government's Response. Unless the Judge orders otherwise, the government must file a response within 20 days after the issuance of the initial scheduling order pursuant to Rule 39(c). The response must not exceed 20 pages in length, including any attachments (other than a copy of the challenged order).

(b) Other Papers. No supplements, replies, or sur-replies may be filed without leave of the Court.

Rule 41. Rulings on Non-frivolous Petitions.

(a) Written Statement of Reasons. If the Judge determines that the petition is not frivolous, the Judge must promptly provide a written statement of the reasons for modifying, setting aside, or affirming the production or nondisclosure order.

(b) Affirming the Order. If the Judge does not modify or set aside the production or nondisclosure order, the Judge must affirm it and order the recipient promptly to comply with it.

(c) Transmitting the Judge's Ruling. The Clerk must transmit the Judge's ruling and written statement of reasons to the petitioner and the government.

Rule 42. Failure to Comply. If a recipient fails to comply with an order affirmed under 50 U.S.C. § 1861(f), the government may file a motion seeking immediate enforcement of the affirmed order. The Court may consider the government's motion without receiving additional submissions or convening further proceedings on the matter.

Rule 43. *In Camera* Review. Pursuant to 50 U.S.C. § 1803(e)(2), the Court must review a petition under 50 U.S.C. § 1861(f) and conduct related proceedings *in camera*.

Rule 44. Appeal. Pursuant to 50 U.S.C. § 1861(f)(3) and subject to Rules 54 through 59 of these Rules, the government or the petitioner may petition the Court of Review to review the Judge's ruling.

Title VIII. En Banc Proceedings

Rule 45. Standard for Hearing or Rehearing En Banc. Pursuant to 50 U.S.C. § 1803(a)(2)(A), the Court may order a hearing or rehearing en banc only if it is necessary to secure or maintain uniformity of the Court's decisions, or the proceeding involves a question of exceptional importance.

Rule 46. Initial Hearing En Banc on Request of a Party. The government in any proceeding, or a party in a proceeding under 50 U.S.C. § 1861(f) or 50 U.S.C. § 1881a(h)(4)-(5), may request that the matter be entertained from the outset by the full Court. However, initial hearings en banc are extraordinary and will be ordered only when a majority of the Judges determines that a matter is of such immediate and extraordinary importance that initial consideration by the en banc Court is necessary, and en banc review is feasible in light of applicable time constraints on Court action.

Rule 47. Rehearing En Banc on Petition by a Party.

(a) Timing of Petition and Response. A party may file a petition for rehearing en banc permitted under 50 U.S.C. § 1803(a)(2) no later than 30 days after the challenged order or decision is entered. In an adversarial proceeding in which a petition for rehearing en banc is permitted under § 1803(a)(2), a party must file a response to the petition within 14 days after filing and service of the petition.

(b) Length of Petition and Response. Unless the Court directs otherwise, a petition for rehearing en banc and a response to a petition for rehearing en banc each must not exceed 15 pages, including any attachments (other than the challenged order or decision).

Rule 48. Circulation of En Banc Petitions and Responses. The Clerk must, after consulting with the Presiding Judge and in a manner consistent with applicable security requirements, promptly provide a copy of any timely-filed en banc petition permitted under 50 U.S.C. § 1803(a)(2), and any timely-filed response thereto, to each Judge.

Rule 49. Court-Initiated En Banc Proceedings. A Judge to whom a matter has been presented may request that all Judges be polled with respect to whether the matter should be considered or reconsidered en banc. On a Judge's request, the Clerk must, after consulting with the Presiding Judge and in a manner consistent with applicable security requirements, promptly provide notice of the request, along with a copy of pertinent materials, to every Judge.

Rule 50. Polling.

(a) Deadline for Vote. The Presiding Judge must set a deadline for the Judges to submit their vote to the Clerk on whether to grant a hearing or rehearing en banc. The deadline must be communicated to all Judges at the time the petition or polling request is circulated.

(b) Vote on Stay. In the case of rehearing en banc, the Presiding Judge may request that all Judges also vote on whether and to what extent the challenged order or ruling should be stayed or remain in effect if rehearing en banc is granted, pending a decision by the en banc Court on the merits.

Rule 51. Stay Pending En Banc Review.

(a) Stay or Modifying Order. In accordance with 50 U.S.C. §§ 1803(a)(2)(B) and 1803(f), the Court en banc may enter a stay or modifying order while en banc proceedings are pending.

(b) Statement of Position Regarding Continued Effect of Challenged Order. A petition for rehearing en banc and any response to the petition each must include a statement of the party's position as to whether and to what extent the challenged order should remain in effect if rehearing en banc is granted, pending a decision by the en banc Court on the merits.

Rule 52. Supplemental Briefing. Upon ordering hearing or rehearing en banc, the Court may require the submission of supplemental briefs.

Rule 53. Order Granting or Denying En Banc Review.

(a) Entry of Order. If a majority of the Judges votes within the time allotted for polling that a matter be considered en banc, the Presiding Judge must direct the Clerk to enter an order granting en banc review. If a majority of the Judges does not vote to grant hearing or rehearing en banc within the time allotted for polling, the Presiding Judge must direct the Clerk to enter an order denying en banc review.

(b) Other Issues. The Presiding Judge may set the time of an en banc hearing and the time and scope of any supplemental hearing in the order granting en banc review. The

order may also address whether and to what extent the challenged order or ruling will be stayed or remain in effect pending a decision by the en banc Court on the merits.

Title IX. Appeals

Rule 54. How Taken. An appeal to the Court of Review, as permitted by law, may be taken by filing a petition for review with the Clerk.

Rule 55. When Taken.

(a) Generally. Except as the Act provides otherwise, a party must file a petition for review no later than 30 days after entry of the decision or order as to which review is sought.

(b) Effect of En Banc Proceedings. Following the timely submission of a petition for rehearing en banc permitted under 50 U.S.C. § 1803(a)(2) or the grant of rehearing en banc on the Court's own initiative, the time otherwise allowed for taking an appeal runs from the date on which such petition is denied or dismissed or, if en banc review is granted, from the date of the decision of the en banc Court on the merits.

Rule 56. Stay Pending Appeal. In accordance with 50 U.S.C. § 1803(f), the Court may enter a stay of an order or an order modifying an order while an appeal is pending.

Rule 57. Motion to Transmit the Record. Together with the petition for review, the party filing the appeal must also file a motion to transmit the record to the Court of Review.

Rule 58. Transmitting the Record. The Clerk must arrange to transmit the record under seal to the Court of Review as expeditiously as possible, no later than 30 days after an appeal has been filed. The Clerk must include a copy of the Court's statement of reasons for the decision or order appealed from as part of the record on appeal.

Rule 59. Oral Notification to the Court of Review. The Clerk must orally notify the Presiding Judge of the Court of Review promptly upon the filing of a petition for review.

Title X. Administrative Provisions

Rule 60. Duties of the Clerk.

(a) General Duties. The Clerk supports the work of the Court consistent with the directives of the Presiding Judge. The Presiding Judge may authorize the Clerk to delegate duties to staff in the Clerk's office or other designated individuals.

(b) Maintenance of Court Records. The Clerk:

(1) maintains the Court's docket and records — including records and recordings of proceedings before the Court — and the seal of the Court;

(2) accepts papers for filing;
(3) keeps all records, pleadings, and files in a secure location, making those materials available only to persons authorized to have access to them; and
(4) performs any other duties, consistent with the usual powers of a Clerk of Court, as the Presiding Judge may authorize.

Rule 61. Office Hours. Although the Court is always open, the regular business hours of the Clerk's Office are 9:00 a.m. to 5:00 p.m. daily except Saturdays, Sundays, and legal holidays. Except when the government submits an application following an emergency authorization, or when the Court otherwise directs, any filing outside these hours will be recorded as received at the start of the next business day.

Rule 62. Release of Court Records.

(a) Publication of Opinions. The Judge who authored an order, opinion, or other decision may *sua sponte* or on motion by a party request that it be published. Upon such request, the Presiding Judge, after consulting with other Judges of the Court, may direct that an order, opinion or other decision be published. Before publication, the Court may, as appropriate, direct the Executive Branch to review the order, opinion, or other decision and redact it as necessary to ensure that properly classified information is appropriately protected pursuant to Executive Order 13526 (or its successor).

(b) Other Records. Except when an order, opinion, or other decision is published or provided to a party upon issuance, the Clerk may not release it, or other related record, without a Court order. Such records must be released in conformance with the security measures referenced in Rule 3.

(c) Provision of Court Records to Congress.

(1) By the Government. The government may provide copies of Court orders, opinions, decisions, or other Court records, to Congress, pursuant to 50 U.S.C. §§ 1871(a)(5), 1871(c), or 1881f(b)(1)(D), or any other statutory requirement, without prior motion to and order by the Court. The government, however, must contemporaneously notify the Court in writing whenever it provides copies of Court records to Congress and must include in the notice a list of the documents provided.

(2) By the Court. The Presiding Judge may provide copies of Court orders, opinions, decisions, or other Court records to Congress. Such disclosures must be made in conformance with the security measures referenced in Rule 3.

Rule 63. Practice Before Court. An attorney may appear on a matter with the permission of the Judge before whom the matter is pending. An attorney who appears before the Court must be a licensed attorney and a member, in good standing, of the bar of a United States district or circuit court, except that an attorney who is employed by and represents the United States or any of its agencies in a matter before the Court may appear before the Court regardless of federal bar membership. All attorneys appearing before the Court must have the appropriate security clearance.